

BOISE, MONDAY, DECEMBER 8, 2008 AT 8:50 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

GOODMAN OIL COMPANY,

Petitioner-Appellant on Appeal,

v.

**SCOTTY'S DURO-BILT GENERATOR,
INC., an Idaho corporation,**

Respondent-Respondent on Appeal,

and

**CITY OF NAMPA, a corporate body politic;
THE CITY COUNSEL of the CITY OF
NAMPA; MAYOR TOM DALE, in his
capacity as Mayor of the City of Nampa;
DIANA LAMBING in her capacity as City
Clerk,**

Respondents.

Docket No. 34284

Appeal from the District Court of the Third Judicial District of the State of Idaho,
Canyon County. Hon. James C. Morfitt, District Judge.

Runft & Steele Law Offices, PLLC, Boise, for appellant.

Moore Smith Buxton & Turcke, Chtd, Boise, for respondent.

This case stems from a dispute in conjunction with the vacation of First Avenue South in Nampa. The present action originated from a complaint filed by Goodman Oil Company (Goodman Oil) against the City of Nampa (the City) and Scotty's Duro-Bilt Generator, Inc. (Duro-Bilt). Duro-Bilt filed a motion to dismiss pursuant to I.R.C.P. 12(b)(6). Subsequent to Duro-Bilt's motion, Goodman Oil filed a motion to amend the complaint to add a claim of tortious interference of a contract against Bart and Alane McKnight (the McKnights) and to add a claim against Duro-Bilt for breach of contract. The district court denied the motion to amend and dismissed Duro-Bilt as a party. The dispute between Goodman Oil and the City continued

resulting in the district court issuing a Writ of Mandate for the vacation of First Avenue South. Goodman Oil then appealed the district court's denial of the motion to amend and the dismissal of Duro-Bilt as a party. Duro-Bilt moved for dismissal of the appeal as untimely, and this Court dismissed the appeal. Goodman Oil filed a motion for reconsideration which this Court granted. The case is now before this Court on the following issues: (1) whether Goodman Oil's notice of appeal was timely filed; (2) whether Goodman Oil's appeal is moot; (3) whether the district court erred by granting Duro-Bilt's motion to dismiss pursuant to I.R.C.P. 12(b)(6); (4) whether the district court erred in failing to grant Goodman Oil's motion to amend the complaint; (5) whether Goodman Oil is entitled to attorney's fees on appeal; and (6) whether Duro-Bilt is entitled to attorney's fees on appeal.

BOISE, MONDAY, DECEMBER 8, 2008 AT 10:00 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

**IN THE MATTER OF THE ESTATE OF)
JAMES EVERETT MONTGOMERY, JR.,)
DECEASED.)**

**-----)
NANCY MONTGOMERY,)**

Plaintiff-Appellant-Cross Respondent,)

Docket No. 33943

v.)

MANS MONTGOMERY,)

Defendant-Respondent,)

and)

MARY L. SIMMONS, personal)

representative of the estate of JAMES)

EVERETT MONTGOMERY,)

Defendant-Respondent-Cross Appellant.)

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Boise County. Hon. Kathryn A. Sticklen, District Judge.

Marcus, Christian & Hardee, Boise, for appellant.

Ringert Clark Chartered, Boise, for respondent Mans Montgomery.

Stoppello & Kiser, Boise, for respondent Mary Simmons.

This case concerns probate of the will of Jim Montgomery (Jim). This appeal arises from the district court's review of the magistrate proceedings. Appellant Nancy Montgomery (Nancy) appeals the district court's affirmation of the magistrate court's grant of summary judgment that Nancy was not an omitted spouse under I.C. § 15-2-301 and the magistrate court's dismissal of her consolidated creditor's claim suit for untimely service of process, as well as the district court's failure to address the magistrate's order indefinitely deferring calculation of what, if any, family allowance is due to Nancy. Respondent and Cross-Appellant Mary Simmons (Mary), the personal representative of Jim's estate, appeals the district court's reversal of the magistrate's

grant of summary judgment that Nancy and Jim were not co-owners of the Alibi Bar (Alibi) and its related assets.

Jim was married to his first wife, Barbara, and was the father of her two children, Mans Montgomery (Mans) and Dannell Montgomery, when he met Nancy in late 1986. It appears that Jim had been involved in the food service industry, but not the business of selling alcohol by the drink. Nancy, however, had considerable experience in the bar business. After meeting Nancy, Jim leased the Alibi Bar in Boise, Idaho in January 1987. Nancy assisted in setting up the business, and at about this time, Jim and Nancy began to live together. Jim subsequently purchased the Alibi, including real and personal property, in late 1987. He also purchased a liquor license in March of 1991. The real property and the liquor license were titled in Jim's name, although there is documentary evidence Nancy contributed \$2,500 toward the purchase of the license.

After owning the Alibi for several years, Jim formed a corporation and an LLC for the purpose of limiting liability for the bar business. There are factual disputes about whether these entities were ever viable, but it is undisputed that none of the Alibi assets were ever transferred to these entities.

On July 5, 1990, Jim executed a will in which he bequeathed a house at 2358 Wyoming Street, Boise, Idaho to Nancy, and left his remaining property to his sons in equal shares. Jim and Nancy were married on October 17, 1991, and remained married at the time of Jim's death on December 2, 2003. During their marriage, Jim sold the Wyoming Street house, the proceeds of which were used, according to Nancy, to purchase a mobile home for Mans. Also during the marriage, Jim and Nancy acquired certain community property by way of joint tenancies with rights of survivorship, including a condominium in Arizona, and bank, brokerage, and retirement accounts, all of which passed directly to Nancy upon Jim's death. Jim's will, which was never changed, was admitted to probate and Jim's sister, Mary, was appointed personal representative.

Nancy filed a petition in the probate proceedings to take an interstate share of Jim's estate as an omitted spouse, and the personal representative filed a motion to have an inventory that designated the Alibi as Jim's separate property confirmed by the court. In response, Nancy asserted that she and Jim were partners in the Alibi business. Nancy also filed a separate suit in district court as a creditor of the estate claiming the estate has been unjustly enriched by her contributions to the Alibi and she should be compensated. The creditor's suit was consolidated with the probate proceedings before the magistrate by agreement of the parties and the case was scheduled for a jury trial. Both sides raised various evidentiary objections. After considerable discovery, Nancy, Mary, and Mans filed cross-motions for summary judgment on the omitted spouse and partnership claims. Mary filed a motion to dismiss the creditor's suit for lack of timely service of process. In addition, Nancy repeatedly moved the magistrate to order Mary to account for and pay to Nancy whatever family allowance she is statutorily entitled to during probate proceedings.

At the September 28, 2005 hearing on the parties' motions, the magistrate decided to forego resolving the parties' objections to evidence and instead to weigh and consider all the evidence offered, regardless of its admissibility under the rules of evidence. The magistrate then

granted summary judgment against Nancy on the omitted spouse and partnership claims. The magistrate also dismissed the creditor's suit. Finally, the magistrate denied Nancy's motion to set a deadline for Mary to complete the accounting regarding Nancy's family allowance.

Nancy appealed to the district court, which upheld summary judgment on the omitted spouse issue, reversed summary judgment and remanded on the partnership issue, and affirmed the dismissal of the creditor's suit. Nancy now appeals to this Court, *inter alia*, the district court's decisions regarding the omitted spouse issue and the creditor's claim, as well as the district court's lack of decision regarding the family allowance. Mary appeals the district court's reversal of summary judgment on the partnership issue. Mans is also a respondent in this case and has filed a brief with this Court.

BOISE, MONDAY, DECEMBER 8, 2008 AT 11:10 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

**AMBER MACKOWIAK, fka AMBER)
HARRIS,**

Plaintiff-Appellant,

v.

SETH HARRIS,

Docket No. 34527

Defendant-Respondent.

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

Bauer & French, Boise, for Appellant.

Weigt Law Offices, Chtd., Meridian, for Respondent.

This appeal concerns the modification of a child support obligation to zero while the payor is incarcerated. Plaintiff-Appellant Amber Mackowiak appeals from a decision of the district court affirming the magistrate court order abating child support obligation during Defendant-Respondent Seth Harris' incarceration. The magistrate court found that Mr. Harris had no other resources to pay child support during his incarceration, and reduced his monthly support obligation to zero until either party petition for a modification after Harris' release. The district court upheld the decision of the trial court. Ms. Mackowiak now appeals to this Court.

On appeal Ms. Mackowiak challenges the Idaho Court of Appeals decision in *Nab v. Nab* allowing courts to modify the child support obligations of incarcerated parents without other resources to zero on grounds that it runs contrary to public policy and the best interest of children.

In addition, Ms. Mackowiak argues the trial court erred in the manner it determined Mr. Harris had no resources to pay child support. Finally, Ms. Mackowiak argued the trial court erred by declining to place an automatic reinstatement of the child support obligation after Mr. Harris' release from custody.